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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1969

No. 1410

MOULTRIE MANUFACTURING COMPANY and WILLIAM E. SMITH, *Petitioners*

v.

TENNESSEE FABRICATING COMPANY, d/b/a TFC Co., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

The decisions of the courts which have considered the first question, to-wit:

> Is Respondent's Certificate of Copyright Registration prima facie evidence of copyright?.

are unanimously in accord with the decision of the Circuit Court.

In cases cited in support of the Petition, the Courts did not rule contrary to the ruling of the Court of Appeals. In the case of *Krafft v. Cohen*. 117 F 2d 578 (3d Circ., 1941), there was proof of plaintiff's publication with an improper notice, in that the notice was in the wrong place and lacked the name of the proprietor. This proof rebuted the *prima facie* case established by the Certificate. Any other language of the Court on this issue was merely *dictum*. The true holding of the *Krafft* decision is that

> "[T]he deliberate selection and use of a certain form of Copyright notice, which fails to meet the substantive requirements [of the Copyright law], can hardly be termed 'omission by accident or mistake of the prescribed notice from a particular copy or copies.' " *Advertisers Exchange v. Anderson*, 144 F 2d 907 (8th Circ., 1944).

It is interesting to note that in all other cases on the issue arising within the Third Circuit, the District Courts have unanimously felt free of the restraints alleged by petitioners to be contained in the *Krafft* case. See *Berlin v. Evans*. 300 F. 677 (D.C., E.D., Pa., 1924); *Dietrich v. Standard Brands, Inc.*, 32 F. R. D. 325, 326 (D.C., E.D., Pa., 1963); *Hedeman Products Corp. v. Tap-Rite Products Corp.*, 228 F. Supp. 630, 633 (D.C., D. N.J., 1964); *Magnus Organ Corp. v. Magnus*, 269 F. Supp. 981 (D.C., N.J., 1967).

In *Gray v. Eskimo Pie Corp.*, 244 F Supp. 785 (D.C., Del. 1965) proof was introduced to show publication was made without any notice at all. The single ruling to the contrary, *Harms, Inc. v. Pure Milk Ass'n.*, 37 U.S.P.Q. 575 (N.D., Ill., 1938), has been effectively overruled by the decision in the case of *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F 2d 546 (7th Circ., 1965), *Cert.* denied 383 U.S. 958.

The rationale of these cases is that defendant's proof of nonexistent notice, can controvert the *prima facie* case made out by plaintiff's certificate of copyright.

The Circuit Courts of Appeal for the Second Circuit *Gerlach-Barlow Corp. v. Morris & Bendien*, 23 F 2d 159 (1927); *Modern Aids, Inc., v. R. H. Macy*, 264 F 2d 93 (1959); the

Seventh Circuit *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F 2d 546 (1965)); the Ninth Circuit *Rohauer v. Friedman* 306 F 2d 933 (1962)); and the Fifth Circuit (in the case sought to be reviewed, *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F 2d 279 (1970)), are all in accord. There is no dissent.

Prior to the 1909 Copyright Act, requirements for perfecting copyrights were strictly construed. *Wheaton & Donaldson v. Peters & Grigg*, 11 U.S. 223 (1834); *Callaghan v. Myers* 128 U.S. 617 (1888). The United States Supreme Court, however, in *Washingtonian Co. v. Pearson*, 306 U.S. 30, 36, (1938), said:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary works of lasting benefit to the world.' "

The liberal spirit of construction, as stated in the *Pearson* decision, should control copyright decisions; and invalidation of a copyright should not be lightly undertaken. *Hirshan v. United Artist Corp.*, 243 F 2d 640, 644 (D. C. Circ., 1957)

The Court may take judicial notice of the fact "that the Examining Division of the Copyright Office, among other things, checks for the adequacy of notice of copyright on works submitted." *Ross Products, Inc. v. New York Merchandise Co.*, 242 F Supp. 879, 880 (D.C., S.D., N.Y., 1965). Section 202.2(b) of the Regulations of the Copyright Office States:

> *Defects in notice*. Where the copyright notice does not meet the requirements of the law, the Copyright Office will reject an application for copyright registration. ***"

The Copyright Office, therefore, had to be satisfied that the copies it received had the proper notice (Exhibit I).

That the notice was included in the copies deposited is, therefore, included within the certificate of copyright. The proper including of the notice of copyright is a "fact stated therein." [i.e., in the certificate, as " *prima facie* evidence," as set forth in Section 209 of the Copyright Act.]

II.

Petitioners' second question, for which review is sought, is, in essence, two issues, and respondent will so treat it.

A. The first portion is:
Does a two-dimensional photograph infringe a copyright protecting a three-dimensional work of art?

The infringement by way of using a picture of the copyrighted design in petitioners' catalogue and in petitioners' advertising material is no less an infringement than the manufacturing of the infringing design units themselves, i.e., the difference in the mode of adaption or expression chosen to infringe cannot be set up as a defense. *Mazer v. Stein*, 347 U.S. 201, 218 (1953); *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Universal Pictures Co. v. Harold Lloyd Co.*, 162 F 2d 354, 360 (9th Circ., 1957); the following cases had facts identical to the case at bar *Bracken v. Rosenthal*, 151 Fed. 136 (N.D., Ill., 1907) (Photograph of bas-relief statue infringed copyright protecting statue); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F 2d 99, 105 (2d Circ., 1951) (Reproductions of copyrighted painting print in catalogues of defendant infringes copyrights protecting print.) *King Features, Inc. v. Fleischer*, 299 Fed. 533 (2d Circ., 1924); *Fleischer Studios v. Freundlich* 73 F 2d 276 (2d Circ., 1934); (3-dimensional doll infringed copyright on 2-dimensional cartoon); *M. J. Golden & Co., Inc. v. Pittsburgh Brewing Co., Inc.* 137 F Supp. 455 (D. C.. Pa., 1956) (2-dimensional copy infringed plaintiff's copyright on 3-dimensional plaque). *Mura v. Columbia Broadcasting Systems, Inc.*, 245 F Supp. 5 (S.D., N.Y., 1965) (Copyright of puppet infringed by picture. but other defenses allowed defendant to prevail). The *Bracken*, *M. J. Golden* and *Mura* cases are particularly in point, each involving a 2-dimensional pirating of a 3-dimensional work; and each holding that infringement occurred.

The Courts in the case of *Scherr v. Universal Match Corp.*, 160 U.S.P.Q. 216, 297 F. Supp. 107 (D.C., S.D., N.Y., 1967) affirmed, 417 F 2d 497 (2d Circ., 1969) assumed that a photograph (in that case, printed on match covers) was infringement of a copyright protecting a large statue. (There were other issues in that case which caused the Courts to hold the copyright invalid).

The early case of *Falk v. T. P. Howell & Co.*, 37 Fed. 202 (C.C., S.D., N.Y., 1888), holding that stamping a picture in leather infringed the copyright protecting the photograph embodying the picture, was cited with approval in the recent case of *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331, 350, (D.C., S.D., N.Y., 1968), a case involving the transformation of a comic-strip character into a doll.

Respondent can find no authority to the contrary, and petitioners cite none.

B. The second phase of Petitioners' second question is:

Was petitioners' use of the catalogue within the doctrine of "Fair Use?"

The latest and most complete discussion of the topic of "fair use" is contained in the opinion in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 306, F 2d 303, 306-310 (2d Circ., 1966). *Cert.* Denied 385 U.S. 1009. The Court there stated (at page 307) that,

> "Whether the privileges [of using copyrighted material without the author's permission] may justifiably be applied to particular material turns initially on the nature of the materials, e.g., whether their [the infringing] distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter***."

See also Yankwich, "What is Fair Use?" 22 U. CHI. L. REV. 203, 213-215 (1945); Schulman, "Fair Use and Revision of the Copyright Act." 53 IA. L. REV. 832 (1968).

This not the case of petitioners' making a contribution to human progress, utilizing, as part of an independent research, Respondent's design unit. It was a wholesale piracy. Respondents must do *something* of their own to obtain the benefits of the doctrine of "fair use." *Rosemont* opinion, *supra* at 310.

Petitioners' sales catalogues contained photographs of Respondent's work of art. Some editions had words of description accompanying the photographs, and other had the photographs only. Petitioners admit that the inescapable conclusion to readers of these sales catalogues would be that the work of art was available for purchase from the Petitioners.

Petitioners ask this Honorable Court to determine that a sales catalogue is not a sales catalogue; and, that if it is a sales catalogue, its purpose is not that of making sales.

III.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

A. J. WHITEHURST
P. O. Drawer 47
Thomasville, Georgia 31792

and

RAYMON SAUER
628 Dermon Building
Memphis, Tennessee 38103

Attorneys for Respondent